Supreme Court, U. S.
FILED
NOV 17 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978
NO. 78-140

ILLO APELBY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the seizure of one motion picture film available for exhibition or sale in an adult bookstore was unreasonable, violating the free speech and press, due process and search and seizure provisions of the United States Con-

stitution, where the affidavit in support of the search warrant related a peace officer's viewing of another film in detail and his description of a binder entitled "Films for Sale" which offered the seized film for sale and had photographs of sexual acts, these films being pandered by the salesman's statement that they were all good hard-core films.

STATEMENT OF THE CASE

In nonjury trials submitted on the transcripts of the preliminary hearings in three different proceedings, petitioner was found guilty of two counts of pandering in violation of California Penal Code section 266i and one count of oral copulation in violation of Penal Code section 288a. His codefendant was found guilty of one count of oral copulation.

On appeal to the Court of Appeal of the State of California, Second Appellate District, Division Five, the convictions for oral copulation were reversed on the basis that a subsequent legislative amendment had eliminated from the proscription against oral copulation the acts which were the basis of the convictions. Petitioner's pandering convictions were affirmed, the court finding that the three search warrants were validly issued.

The first search warrant, which resulted in seizure of the film now challenged by petitioner, was based upon the affidavit of Los Angeles Police Officer John K. Kinard describing his observations at the Camelot Book Store at 14430 Victory Boulevard in Van Nuys on December 4, 1973. The affidavit states that Officer Kinard knew the operator, Timothy Lynch, and that Mr. Lynch said, "Films that we sell are hard core. They all show penetration . . ." Officer Kinard noted numerous stacks of films on the counter and on shelves behind the counter which had

still photographs on the outside of the packages depicting oral copulation, sexual intercourse, sodomy, or mutual masturbation. Mr. Lynch stated that they were all hard core pornography. He opened and leafed through a binder on the counter entitled "Films for Sale," and Officer Kinard observed numberous photos depicting males orally copulating females, females orally copulating males, and sexual intercourse. Mr. Lynch stated, "These are good hard-core films, especially the pretty girl series." Officer Kinard subsequently paid $1 for a private viewing of the film "Super Tits," taking notes of the action depicted on the screen. His verbal description of that film covers over 40 typewritten lines of his affidavit.

The search warrant authorized seizure of various films including all of the films in the binder titled "Films for Sale." The film "Swedish Erotica Number Four," which was depicted in the binder, was seized from a counter drawer.

ARGUMENT

THE AFFIDAVIT CONTAINED A SUFFICIENT DESCRIPTION OF THE MATERIALS TO BE SEIZED TO PERMIT THE MAGISTRATE TO FOCUS ON THE QUESTION OF OBSCENITY

Petitioner contends that the affidavit in support of the search warrant presented no facts to the magistrate to permit him to "focus searchingly on the question of obscenity" as he contends is required by *Marcus* v. *Search Warrant* (1961) 367 U.S. 717, 732. (Pet. pp. 10-11.) Petitioner thus appears to argue that only the actual viewing of all the films by the peace officer and his detailed description in the affidavit will permit the magistrate to determine probable obscenity. Such a proposition, of course, is meant to create such an impossible burden for

law enforcement that seizure of large quantities of pornographic films from adult book stores would be obviated.

Petitioner not only misreads the dictates of the *Marcus* decision but also misapplies that decision to selected facts in this case. The procedure condemned in *Marcus* for its failure to give due regard to the possible consequences for constitutionally protected speech involved warrants issued on the strength of conclusory assertions of a single police officer without any scrutiny by the judge of any materials considered by the officer to be obscene. (*Marcus* v. *Search Warrant, supra,* 367 U.S. at pp. 731-732.) Rather than requiring that a magistrate "focus searchingly on the question of obscenity" as petitioner suggests, the *Marcus* decision merely concludes that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without safeguards, such as a guide for the exercise of informed discretion and an opportunity for reflection and deliberation. (*Marcus* v. *Search Warrant, supra,* 367 U.S. at pp. 732-733.)

As applied to the facts of this case, the *Marcus* standards were met. It was the magistrate who determined whether the films were obscene, and no discretion was given to the officers, who were directed to seize all of the films depicted in the binder "Films for Sale." The magistrate determined that these films were obscene from (1) the detailed description of the film "Super Tits," which description took 40 typewritten lines, (2) the officer's description of the sex acts depicted in the photos in the binder, and (3) the operator's pandering of the films as hard-core pornography. As to the last point, both state and federal decisions leave no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. (*Splawn* v. *California* (1977) 431 U.S. 595, 598; *People* v. *Burnstad* (1973) 32 Cal.App.3d 560, 565; *People* v. *Golden* (1971) 20 Cal.App.3d 211, 217.)

Petitioner's First and Fourth Amendment rights were not violated by these procedures which had the safeguards which due process demands to assure that non-obscene material is given the constitutional protection to which it is entitled.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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